IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-817

NEBRASKA PRESS ASSOCIATION, *et al.*,
Petitioners,

v.

HUGH STUART, JUDGE, DISTRICT COURT OF LINCOLN COUNTY, NEBRASKA, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF OF RESPONDENT-INTERVENOR, ERWIN CHARLES SIMANTS

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OPINIONS AND ORDERS BELOW

The respondent herein agrees with the statement made in petitioners' brief with regard to the opinions and orders below.

JURISDICTION

The decision of the Supreme Court of Nebraska was issued on December 1, 1975. Certiorari was granted on December 12, 1975. The jurisdiction of this Court was invoked pursuant to 28 U.S.C., Sec. 1257(3) (1973).

QUESTIONS PRESENTED

1. Whether freedom of the press as outlined in Amendment One to the Constitution of the United States grants an unqualified right to the press to publish any and all matters involved in a criminal trial or whether it is necessary to balance the Sixth Amendment rights of the defendant to a trial by a fair and impartial jury against the rights of the press under the First Amendment by allowing Courts to enter restrictive orders as to what may be printed by way of pre-trial publicity.

2. Whether a trial court when confronted with evidence of press coverage and based upon a knowledge of the community in which a trial is to be had and the amount of publicity being generated in the community concerning such a case may constitutionally place restriction upon the dissemination of pre-trial publicity.

3. Whether the order of the Nebraska Supreme Court entered on December 1, 1975, can be sustained as a matter of law and fact.

4. Whether the issues presented in the instant case are moot.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the Constitution of the United States provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Sixth Amendment of the Constitution of the United States provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment of the United States Constitution provides in part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The respondent herein agrees with the Statement of the Case as set forth in petitioners' brief at pages 4 through 23, however, respondent herein does not agree with the statements as set forth on page 21 of the petitioners' brief herein that the question involved before this Court has not been mooted by the expiration of the Nebraska Supreme Court's order and, further, disagrees with and does not accept as accurate the affidavit made at (JA 14-16, 8) of the Statement of the Case of petitioners herein – the affidavit of Kiley Armstrong.

SUMMARY OF ARGUMENT

By necessity the First and Sixth Amendment of Constitution of the United States, being "preferred amendments to that document" present a clash as between the respective rights enunciated under those amendments. While a Court has inherent power to protect itself and its processes with a variety of means in order to insure that a criminal defendant obtain a fair trial, it is nevertheless necessary in matters that gain a great deal of press attention, that the Courts, in order to insure that the defendant be given a fair trial, must by necessity have included within their inherent powers the powers to protect their processes and the ability to enter prior restrictive orders on the publication of news items in order to insure that a potential juror does not base opinions upon items related through the press which may or may not be admitted at trial and thereby color his judgment with regard to an ultimate decision

on the facts of a particular case on information and evidence. The various palliative means by which a Court may secure an impartial jury and the means of screening jurors are not in and of themselves adequate to insure that a defendant obtain a fair trial and where a clear and present danger exists that a defendant may not be able to obtain a fair trial, it is imperative that the Court, either by way of an order based upon motions filed by counsel in the matter, or *sua sponte*, issues orders restricting press coverage. The First Amendment to the Constitution of the United States does not present an absolute right to publish with impugnity but by necessity and in order to preserve the effectiveness of the entire document and particularly the First and Sixth Amendments to the Constitution, it is necessary to engage in a balancing of interests in order to allow that both Amendments be given equal footing in preserving both the rights of freedom of the press and a fair trial for a defendant in a criminal case. The order of the Supreme Court having expired with the selection of a jury in the case of State of Nebraska v. Erwin Charles Simants, the issues presented here are moot.

ARGUMENT

We would agree with the statement made in *Bridges v. California*, 314 U.S. 252, 260 (1941), that,

> " * * * free speech and fair trials are two of the most cherished policies of our civilization and it would be a trying task to choose between them."

However, based upon the facts and circumstances of the matter now before the Court and based upon the

many factors which affect the trial of a defendant in a criminal case, it is necessary to strike a balance between the two Amendments to insure that the defendant obtain a fair trial and that the press be able to pursue its function of informing the general public with regard to the operations of its government and continue to maintain the integrity of the two Amendments to the Constitution of the United States that are involved.

I.

TRIAL OF A CRIMINAL CASE DOES NOT COMMERCE UNTIL A JURY IS SWORN TO HEAR THE EVIDENCE.

In order to place the matter before the Court in proper perspective, it is submitted that the trial of a criminal case begins at the time a jury of the prescribed number of 12 individuals is sworn and ready to hear the evidence to be presented in a case. In this instance, Nebraska Statutes provide in Section 29-2016, R.R.S. 1943, as amended,

> "After the jury has been impaneled and sworn, the trial shall proceed in the following order: (1) The counsel for the state must state the case of the prosecution and may briefly state the evidence by which he expects to sustain it; (2) the defendant or his counsel must then state his defense and may briefly state the evidence he expects to offer in support of it; (3) the state must first produce its evidence; the defendant will then produce his evidence; (4) the state will then be confined to rebutting evidence, unless the court for good reason in furtherance of justice, shall permit it to offer evidence in chief; (5) when the evidence in

> concluded, either party may request instructions to the jury on the points of law, which shall be given or refused by the court, which instructions shall be reduced to writing if either require it; (6) when the evidence in concluded, unless the case is submitted without argument, the counsel for the state shall commence, the defendant or his counsel follow, and the counsel for the state conclude the argument to the jury; (7) the court after the argument is concluded shall immediately and before proceeding with other business charge the jury, which charge or any charge given after the conclusion of the argument shall be reduced to writing by the court, if either party requests it before the argument to the jury is commenced; and such charge or charges or any other charge or instruction provided for in this section, when so written and given, shall in no case be orally qualified, modified, or in any manner explained to the jury by the court; and all written charges and instructions shall be taken by the jury in their retirement and returned with their verdict into court, and shall remain on file with the papers of the case."

Section 29-2007, R.R.S. 1943, as amended, provides as follows:

> "All challenges for cause shall be tried by the court, on the oath of the person challenged, on or other evidence, and such challenge shall be made before the jury is sworn and not afterward."

It is readily apparent from a reading of the two sections above that anything that transpires in the pre-trial processes prior to the time of the swearing of the jury is a matter separate from trial and, therefore, anything affecting the case prior to the time that a jury is sworn should be considered as pre-trial publicity and should fall within the area that may be restricted with

regard to the publication of items and news items from such pre-trial proceedings. The question of when a trial commences is governed by the applicable statutes and even where it has been considered that voir dire examination of a jury is considered part of the trial, it is not to be considered a trial upon the facts. *Pfleeger v. Swanson*, 229 Or. 254, 367 P.2d 406, and further, it has been held that the impaneling of a jury is mere preparation for a trial. *Yulee v. Vose*, 99 U.S. 539 (1879).

II.

ANY PUBLICITY GIVEN A CASE PRIOR TO THE TIME A JURY IS SWORN IS PRE-TRIAL PUBLICITY.

The above is advanced to the Court to justify a restriction as to pre-trial publicity as opposed to publicity during a trial as there is no serious contention made here that once a jury is sworn and a Court can take the proper measurer to sequester a jury and employ other means to protect its processes that then the Court could allow publication of all items concerning the trial as the jury could not be tainted by such publicity except perhaps as required under *Sheppard v. Maxwell*, 384 U.S. 333 (1966). The allowance of judicious restrictions on pre-trial publicity can and does cure many of the ills that arise during the course of a jury selection with regard to the ability of counsel to select an impartial jury that cannot be cured in any manner except by restrictions on pre-trial publicity. First of all, during the course of the processes leading to trial and before the jury has been sworn,

such as the hearing on the setting of bond, the preliminary hearing, the various pre-trial motions, arraignment, and jury selection, it is often necessary for both the prosecution and the defense to introduce certain evidence, evidence which in some instances may not be admissible at trial, and evidence which may be pertinent to the pre-trial procedure but not the merits of the case. Dissemination of this information throughout the community from which the jury is to be selected, prior to trial has the effect of tainting the thinking of any potential jurors that may be eventually selected in the case. Secondly, the press does not generally limit itself to mere recitations of the facts of the case but engages in the printing of various personal sketches both of the defendant and of the victim or victims, of the principals to the trial, of the defendant's family and the victim's family, all of which can be prejudicial to the defendant and all of which could tend to create an atmosphere impairing the selection of an impartial jury.

The factual matters in State of Nebraska v. Erwin Charles Simants, in the District Court of Lincoln County, Nebraska, out of which the order of the Supreme Court of Nebraska arose, was a case in which the fact situation were notorious. The defendant was accused of six felony murders which included within those counts the commission of or the attempted commission of three sexual assaults upon the female victims of the murders. Information on the sexual assaults was available to the prosecution on the night of the incident, October 18, 1975, but was not revealed to the press. Evidence of the sexual activity which could have occurred after death quite readily is such as would inflame the passions of anyone who would potentially

sit upon a jury in this matter. The press gave the incident a great deal of publicity immediately after the incident, all of which the County Judge of Lincoln County, Nebraska and the District Judge of Lincoln County, Nebraska were aware of at the time of the entry of their respective orders.[1] In support of the orders entered and particularly the order issued by Judge Stuart, the Lincoln County District Judge, the situs of the incident is a sparsely populated county in West Central Nebraska with a County Seat at North Platte with a population of 21,000 individuals with another 9,000 individuals residing in the County. The Village of Sutherland, the town in which the incident occurred has a population of 800. News is rapidly disseminated, either through the press or word of mouth throughout the entire area. The Lincoln County area is saturated with news media to include local, regional, and state newspapers, three radio stations, and three television stations. Information is available to all and in a community so small in size is more rapidly and readily conveyed by word of mouth and gossip than it would be in a large metropolitan area or populas area.

[1]The North Platte Telegraph devoted page 1 of its Monday, October 21, 1975 issue carried an article complete with pictures of the defendant, his alleged victims, a recitation of what had allegedly occurred, together with articles showing the Sutherland community attitude, and an article on the funeral of the victims and a story concerning the fact that reporters on the case to include reporters from several papers and to include Associated Press and United Press International were cooperating to disseminate information (JA-83). Other evidence of what was disseminated during the period of time prior to the issuance of the restriction order by the District Court is found at (JA 84-98).

III.

THE SIXTH AMENDMENT RIGHT OF A DEFENDANT TO A TRIAL BY AN IMPARTIAL JURY IS A PERSONAL RIGHT.

The Sixth Amendment of the Constitution of the United States makes it clear that a defendant in a criminal case is entitled as a matter of personal right to a fair and impartial trial by jury. The rights to a free press enunciated under the First Amendment to the Constitution of the United States and the right to a fair and impartial trial is one of the mainstays of our democracy. While the Sixth Amendment requires a trial by an impartial jury, it is silent as to what criteria shall be applied or what standards shall be used in assessing the degree of impartiality any one juror or any one jury shall have as a qualification to sit on the trial of a criminal case. The United States Supreme Court's earlier statements with regard to what constitutes an impartial juror are set forth in *Irvin v. Doud*, 366 U.S. 717 (1961), in which it appears that if a juror who has knowledge of the facts of a particular case prior to the time of trial and upon his voir dire examination relates that he can set aside any pre-conceptions or opinions that he has, concerning the merits of the case, he is, therefore, impartial and is, therefore, qualified to sit. In *Irvin v. Doud*, supra, the Court said citing the case of *Spies v. Illinois*, 123 U.S. 131 (1887):

> "This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression

or opinion and render a verdict based on the evidence presented in court."

This Court also recognized in *Marshall v. United States*, 360 U.S. 310 (1959) that dissemination of news items that reach potential jurors can have a deleterious effect upon the impartial nature of a juror called upon to sit in a particular case and at page 313 of the opinion the Court said:

> "We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence."

The Court further cited the case of *Michelson v. United States*, 335 U.S. 469. The Court then gave greater dimension to the concept of what constitutes an impartial juror in the case of *Witherspoon v. Illinois*, 391 U.S. 510 (1968). In that case, jurors who expressed qualms about the infliction of the death penalty in a murder case were successfully stricken by the prosecution. The Court said:

> "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. Guided by neither rule nor standard, 'free to select or reject as it (sees) fit, 'a jury that must choose between life imprisonment and capital punishment can do little more – and must do nothing less – than express the conscience of the community on the ultimate question of life or death. Yet, in a

> nation of less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment – of all who would be reluctant to pronounce the extreme penalty – such a jury can speak only for a distinct and dwindling minority.
>
> If the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply 'neutral' with respect to penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die.' "

The question that has arisen as to whether or not a juror exposed to news items concerning the trial of a case and who as the result of watching, reading and hearing such news items develops a preconceived opinion, can lay aside that opinion and render a judgment based upon the facts as presented at trial has had a great deal written about it but there seems to be little empirical data available and further study is needed to determine the effect of news items upon the minds of jurors and their ability to sit impartially on a

case after they have been exposed to news items concerning a particular case.[2]

While studies are being conducted with regard to the effect of news items upon potential jurors and before further data is completed and concrete solutions can be made, everything must be done to insure that a fair trial can be had and the only matter in which that can be accomplished is to allow restrictive orders with regard to pre-trial publicity and an effort to keep a potential jury insulated from the facts of a case until they are sworn and ready to accept the facts as provided by both sides to the litigation and can determine such facts based upon the instructions of the trial judge.

The American Bar Association has conducted lengthy studies into the area involved in this litigation and with regard to the questions here has prepared among their Standards for the Administration of Criminal Justice the, "The American Bar Association Project on Standards for Criminal Justice, Standards Relating to Fair Trial, and Free Press, approved draft 1968 in which is provided Rule 3.1, where recommendation is

[2]In The American Bar Association Project on Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press Approved Draft 1968, the problem with regard to studies available on the effect of such news media is discussed and at Note 136 this Project cites:

> "136. See, e.g. Free Press-Fair Trial, A Report of the Proceedings of a Conference on Prejudicial News Reporting in Criminal Cases (Inbau ed. 1964); Bureau of Applied Social Research, Graduate School of Journalism, and Project of Effective Justice, Columbia University The Effects of News Media on Jury Verdicts; Examination of the Problem and a Proposal (Prepared for the National Conference of State Trial Judges, May 1964)."

made that a rule be adopted in each jurisdiction by the appropriate Court as follows:

> "3.1 Pretrial hearings.
> "It is recommended that the following rule be adopted in each jurisdiction by the appropriate court:
>
> Motion to exclude public from all or part of pretrial hearing. In any preliminary hearing, bail hearing, or other pretrial hearing in a criminal case, including a motion to suppress evidence, the defendant may move that all or part of the hearing be held in chambers or otherwise closed to the public on the ground that dissemination of evidence or argument adduced at the hearing may disclose matters that will be inadmissible in evidence at the trial and is therefore likely to interfere with his right to a fair trial by an impartial jury. The motion shall be granted unless the presiding officer determines that there is no substantial likelihood of such interference. With the consent of the defendant, the presiding officer may take such action on his own motion or at the suggestion of the prosecution. Whenever under this rule all or part of any pretrial hearing is held in chambers or otherwise closed to the public, a complete record of the proceedings shall be kept and shall be made available to the public following the completion of trial or disposition of the case without trial. Nothing in this rule is intended to interfere with the power of the presiding officer in any pretrial hearing to caution those present that dissemination of certain information by any means of public communication may jeopardize the right to a fair trial by an impartial jury."

It does not appear anywhere that the "trial on the facts" or "trial on the merits" should be closed to the scrutiny of the press or the public but it does appear that a different criteria should be applied to the

dissemination of pretrial publicity and that is that pre-trial hearings may simply be closed to protect the Court and its processes by insulating potential jurors from excessive pretrial publicity.[3]

IV.

COURTS HAVE THE INHERENT POWER TO PROTECT THEIR PROCESSES.

The ability and inherent power of Courts to protect themselves and their processes is well established in American Law. *Lehman v. State*, (Okla. Crim.), 355 P. 7, 444. *Wassung v. Wassung*, 136 Neb. 440, 286 NW 340. *Wood v. Georgia*, 370 U.S. 375 (1962). Even to the extent that they may correct matters which have been wrongfully done by virtue of their processes. *U.S. v. Morgan*, 307 U.S. 183 (1939). It is, therefore, quite obvious that Courts have the right to punish those through their contempt powers that would interfere with their processes and this would include the members of the press, who through their publication, would interfere with the orderly processes of the Court system.

[3]Sheppard v. Maxwell, could present an exception to the statement made here in that the opinion of the Court in referring to the exaggerated factual situation there spoke to the effect:

> "If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception."

An indication could be had here that in those cases where it appeared necessary restrictions on reporting could be placed upon reports of the actual trial.

V.

THE FIRST AMENDMENT TO THE CONSTITUTION DOES NOT PROVIDE FOR AN UNLIMITED, UNQUALIFIED RIGHT TO FREEDOM OF THE PRESS.

It must be stated that while the petitioners would ask that the press has unqualified rights it must be remembered that the right to free speech and free press is not absolute, is not unlimited, and under proper circumstances can be controlled.

In *Chaplinsky v. New Hampshire*, 315 U.S. 568, (1942), the Court said:

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that right of free speech is not absolute at all times and under all circumstances."

While the above case is one involving the constitutionality of a statute prohibiting the use of certain words, nevertheless, the case does stand for the proposition that where utterances and communications are of such a nature that injury can result by the use of them, they may be suppressed. This case cites the earlier case of *Bridges v. Calif.*, 314 U.S. 252 (1919), in which the Court discussed the "clear and present danger" cases with regard to the effect of publicity upon the judicial processes and in that case the Court said:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that will bring about the substantive evil that Congress has the right to prevent. It is a question of proximity and degree * * * "

Turning from these earlier cases to *Sheppard v. Maxwell*, 384 U.S. 333 (1966), it is readily apparent that where there is a clear and present danger that publicity exceeding the normal bounds of reporting and where news media representations tend to saturate an area, a Court must take action to prevent such publicity in order to assure that the defendant can obtain the due process requirements of a fair trial by an impartial jury free from outside influences. In *Sheppard v. Maxwell*, supra, the Court after reviewing all of the incidents which occurred from the time of the incident through the course of the trial and which, to be sure, presented exaggerated situations of press activity, the Court said:

> "But where there is a reasonable liklihood that prejudicial news prior to trial will prevent a fair trial, the Judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the Judge should have raised *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered."

The Court then went on to say:

> "But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The Courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences."

It is readily obvious from a reading of the Sheppard decision, that a dividing line must be drawn that would preserve the integrity and effectiveness of both the First and the Sixth Amendment of the Constitution of the United States. Where the dividing line should be drawn

cannot be based upon generalities but must be based upon the particular interest involved in each case, and upon the community's evaluation of the factors involved and as they affect the interests of each provision to the Constitution of the United States and as the absence of one would affect the other in a free democracy. The Nebraska Supreme Court in considering the question before it with regard to the balancing of the interests in this case chose to incorporate Rule 3.1 of The American Bar Association, Project of Standards of Criminal Justice Standards Relating to Fair Trial and Free Press, approved draft 1968. *State ex rel. Press Assn. v. Stuart*, 63 S.C.J. 783, 194 Neb. 783.

Pursuant to the provisions of the Sixth Amendment, it is apparent that one accused of crime would have the right to eliminate the public and the press from at least pre-trial proceedings. The Sixth Amendment guarantees the right to "public trial" and, as pointed out before in this brief, the actual trial of a criminal case does not begin until the jury is sworn and ready to hear the evidence. The accused may not have the right to a "private trial" but it would appear that he does have the right to have members of the press and the public excluded from hearings before trial. In *United States v. American Radiator & Standard Sanitary Corporation*, (1967) (DC Ta) 274 F. Supp. 790, although the Court rejected the request for a closed hearing on a motion to suppress certain evidence, the Court nevertheless did comment that the question of closing a hearing is one of judicial discretion. It should be noted that in some jurisdictions, statutes provide for the closing of certain hearings and pre-trial matters and that these statutes have withstood constitutional attacks as being permissible balances of the rights of the public and of the

rights of an accused to a fair trial. In *State v. Meek*, 9 Ariz. App. 149, 450 P. 2d 1115, *certiorari denied*, 396 U.S. 847, the Court allowed the accused to have the press excluded from a preliminary hearing at the request of the accused and there said:

> "That this was a constitutionally permissible balance of the interests of the public as against the rights of an accused to a fair trial."

In *Asbill v. Fisher*, 84 Nev. 414, 442 P. 2d 916 (1968), where a statute provided that only Court officials could be present at preliminary examinations and that all other parties could be excluded, the Court held that a statute such as this was permissible in the interests of obtaining a fair trial for the defendant in that most often in the accusatory processes the preliminary hearing is a time when only the prosecution's version of the case is presented with the possibility of prejudice resulting therefrom. With a similar statute in *People v. Elliott*, 54 Cal. 2d 498, 6 Cal. Rprtr. 753, 354 P. 2d 225 (1960), the Court upheld a statute allowing the accused to make a request for a closed preliminary examination stating that the preliminary examination is often a time when only the prosecution presents evidence and the defendant remains silent once it appears that probable cause has been established. One of the purposes the Court pointed out for the opportunity for the defendant to close to press and public such a hearing is to protect his right to an impartial and unbiased jury by preventing the dissemination of information presented at the time of a preliminary examination.[4]

[4] Among those states that have statutory rules for closing of a preliminary hearing either in whole or in part are:

Arizona, Ariz. R. Crim. P. 27.
California, Cal. Penal Code § 868.
Idaho, Idaho Code Ann. § 19-811
Montana, Mont. Rev. Code Ann. 94-6110.
Nevada, Nev. Rev. Stat. § 171.445
North Dakota, N. D. Cent. Code § 29-07-14

VI.

THE NEBRASKA SUPREME COURT PROPERLY ENTERED AN ORDER OF RESTRICTING PRETRIAL PUBLICITY IN THE CASE OF STATE OF NEBRASKA V. ERWIN CHARLES SIMANTS.

Part of the potential dangers in the matter involved here can be exemplified by the affidavit of Kiley Armstrong, where in Paragraph 8 of the affidavit is misquoted a note written by the defendant as it was testified to at the time of the preliminary hearing by an investigator of the Nebraska State Patrol and further the Affidavit misquotes defense counsel in Paragraph 9 of the affidavit with regard to his statement concerning statements made by respondent (JA 13).[5] While

[5] In her affidavit, Kiley Armstrong states in Paragraph 8 that a note by the defendant read "I am sorry. Do not cry. It was the only way.", and that the same was testified to by Terry Livingood, Nebraska Patrol Investigator. The testimony given by Investigator Livingood was that the note read. "I am sorry to all. It is the best way out. Do not cry." Transcript of Preliminary Hearing, State of Nebraska v. Erwin Charles Simants. County Court of Lincoln County, Nebraska, Case No. 75-789. The testimony given by Investigator Livingood indicates a suicide note while the statement as related by Kiley Armstrong does not.

In Paragraph 9 of her affidavit, Kiley Armstrong quotes one of the defense attorneys upon calling for a recess to examine the transcript of the "confession – I mean statement" when in fact counsel said, "Your honor, I plan or I'd like to ask a few questions of the sheriff on voir dire prior to making any objection to this confession or this statement. Could we have a few minutes for a recess?

The affidavit would show that the statement made by defense counsel characterized the statement as a confession which it did not. In any respect, at that point in time publication would have been prejudicial.

reporting the evidence in preliminary matters as exemplified above, many times inadvertently statements are distorted from the actual context and also from their actual wording as they appear at the time of preliminary proceedings and it is in this distorted fashion that such statements appear before the general public through the news media with the potential of contaminating the thinking of prospective jurors. Many propositions have been advanced for the curing of the problems arising out of publicity that may adversely affect the defendant's right to a fair trial. Among these are change of venue, sequestration of the jury, continuances, mistrials and reversals. In line with the above prescribed alternatives as suggested by the petitioners herein, further allegation is made that the defendant did not take any steps to assure fair trial other than to ask for prior restraint on the press. The defendant did, in fact, ask for a change of venue moved that the potential jurors be voir dired at one time in order that any matters brought out during the course of voir dire of a prejudicial nature would not contaminate the entire venire, moved to sequester the witnesses, moved to sequester the jury. All of the motions except for a change of venue were granted by the trial judge. As in *Sheppard v. Maxwell*, these remedies are mere palliatives and the alternatives presented to the Court are non-effective in that it is not possible, for instance, to sequester everyone in the community who may be potential jurors in that sequestration is not possible until the jury is selected and sworn. With regard to continuances to permit a "cooling off" period, Nebraska statutes provide that a defendant, in a criminal case, must be brought to trial within 6 months

from the date of the filing of the information.[6] For where it is concerned, Section 29-1207, provides that a defendant in a criminal case be brought to trial within 6 months after the date of the filing of the information and the argument that the petitioner made to the effect that a continuance could be relied upon would require the defendant yet to waive another constitutional guarantee under the Sixth Amendment to the Constitution of the United States and that is his right to a speedy and public trial. During the course of these proceedings the defendant-respondent, Erwin Charles Simants, has pursued the matter involving the question of law in press coverage of pre-trial proceedings in order to protect and preserve any issues arising out of the possibility of adverse publicity to his cause in the Lincoln County District Court and upon the joint request for restriction of press coverage and has entered his intervention in all matters arising out of this question (JA 117). The District Court of Lincoln County, Nebraska had before the at the hearing held on the night of October 23, 1975, ample evidence upon which to conclude that a restriction on press coverage was in order. Even without evidence before it would appear from *Sheppard v. Maxwell*, supra, that the court has a duty to take action once it has been brought to its attention that adverse publicity might, in fact, impair the right of the defendant to secure a fair trial.

The decision of the Nebraska Supreme Court does not defy analysis as contended by the petitioners. The Court recognizes the guarantees of freedom of speech and of the press as co-equal amendments to the

[6]Section 29-1207, R.R.S. 1943, 1974 Cum. Supp. provides: "(1) Every person indicted or informed against for any offense shall be brought to trial within six months, • • • "

Constitution, *State of Nebraska v. Simants*, supra, and further recognizes that a balancing of the defendant to rely upon continuances in the State of Nebraska is to ask him to again waive another right under the Sixth Amendment of the Constitution of the United States, his right to a speed trial. With regard to the other alternatives proposed all these are available only at the time of trial and would be available to the defendant only after the damage has been done by excessive pre-trial publicity. The petitioners herein contend that all the proceeding in a court action should be held open to the press in that the press must monitor processes and show to the public any corruption or irregularities that may occur in the court system and its processes. Cases such as the one out of which the instant issue arose are rarities and it is unlikely there would be an occurrence of corruption of the courts' practices with as much scrutiny and interest as was afforded this case. Corruption or subversion would be most likely occur in the day to day, humdrum activities that the press rarely takes an interest in save for printing the headings of the cases in an abscure "on the record" column or on the back pages of a local daily. Following the mandates of the restrictions as contemplated by Rule 3.1 as adopted by the Nebraska Supreme Court would more than adequately provide for these rare and exceptional cases that brings the intensive interest of the various members of the press.[7] As most pretrial hearings are held in Courts of record the press will undoubtedly have access to the records of such and could publish these matters once the jury was sequestered and prejudicial interests under both Amendments is necessary in order to

[7] Rule 3.1 provides that a record be made of hearings.

preserve the integrity of each. The Court was confronted by the absolutist position of the press, the relators, insofar as the freedom of the press is concerned and went on to discuss that insofar as the matters before it were concerned they had considered the statements of the representative of the press that freedom of the press be not impinged in the slightest degree. The Court, in relying upon the case of *Branzburg v. Hayes*, 408 U.S. 665 (1972). This case involved the appearance of a reporter before a Grand Jury who relied upon First Amendment of Rights in refusing to appear. It would appear from the opinion that this Court nevertheless did consider the needs for balancing of interests to provide for integrity in the First Amendment and the administration of justice. The Court said at page 683 of its opinion:

> "The prevailing view is that the press is not free to publish with impunity everything and anything it desires to publish."

The Court went on to say at page 684 of the opinion:

> "Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal."

The Court then went on to cite *Sheppard v. Maxwell*, supra. After discussing the constitutional basis for grand jury investigation the Court said further at page 690:

> " * * * fair and effective law enforcement aimed at providing security for the person and property of the individual is the fundamental function of government and the grant jury plays an important constitutional mandated role in this process."

Without belaboring the point further, it is obvious that First Amendment guarantees can be qualified in the interests of balance and the Supreme Court of the State of Nebraska in issuing its order did so and did so rightfully.

VII.

THE QUESTION INVOLVED HERE IS MOOT.

The order of the Supreme Court of the State of Nebraska ceased at the time a jury was sworn to hear the evidence in the State of Nebraska v. Erwin Charles Simants in the Lincoln County District Court. The restrictive order in the case at bar originally entered by Lincoln County Judge Ronald A. Ruff on October 21, 1975, and subsequently upheld in pertinent parts by District Judge Hugh Stuart, the Honorable Justice Blackmun of the Supreme Court of the United States and the Supreme Court of the State of Nebraska has, buy its own terms, ceased in existence on January 7, 1976, the date 12 jurors were sworn to hear the evidence in the case. Therefore, there exists at the time of this appeal no case or controversy between the named parties to this case.

It is well settled that federal courts may act only in the context of a justiciable case or controversy and may

not act in a vacuum. *Benton v. Maryland*, 395 U.S. 784, 788 (1969). The exercise of judicial power of federal courts depends on the existence of a case or controversy. Article III, Section 2, United States Constitution. The usual rule in federal cases is that an actual controversy must exist to all stages of appellate or upon a review upon certiorari and not simply at the date the action is initiated. *S.E.C. v. Medical Committee for Human Rights*, 404 U.S. 403 (1972). In *Times-Picayune Publishing Company v. Schulingkamp*, 419 U.S. 1301 (1974), in which Mr. Justice Powell in chambers considering a matter where a restrictive order appeal, although not as concerned with pre-trial matters as the order in this case, was dismissed as being moot by this Court, 420 U.S. 985 (1975).

As pointed out in brief for petitioners, the Court has created exceptions to the above criteria. Specifically, certain rules must be followed in the certification of class actions – *Roe v. Wade*, 410 U.S. 113 (1973), a highly discretionary, hard-to-define exception of questions which were "capable of repetition yet evading review," *Southern Pacific Company v. I.C.C.*, 219 U.S. 498 (1911); *More v. Ogilivie*, 394, U.S. 814 (1969).

This case obviously is not brought as a class action and it is respondent's contention that the question presented to the Court does not fit into the limited, categorical exception of "capable of repetition yet evading review." That standard applies only to the named parties in this case and not to the hypothetical and conjectural fears expressed by the press elsewhere in the country.

In *Southern Pacific Terminal Company v. I.C.C.*, supra, the Court expressed concern that the named defendants in that case could be expected to act

contrary to the rights asserted by the particular named plaintiffs. The Court expressed the same concern for the named parties continuing labor activities in *Caroll v. President and Commissioners of Princess Ann*, 393 U.S. 175, (1968). Also, in *Sosna v. Iowa*, 42 L. Ed. 2d 532 (1975), the Court has shown that capable repetition end standard applies only to the named parties in the particular case under review when it is specifically stated that

> "* * * unless we were to speculate that she (Sosna) may move from Iowa only to return and later seek a divorce within one year from her return. The concern that prompted this Court's holdings in Southern Pacific and More, supra, do not govern applicant situation."

Therefore, in order for that standard to apply here the Court must speculate as to the possibility of Judge Hugh Stuart having to order a restrictive order on the press in the future as "capable of repetition" standard was not applicable in Sosna it is not applicable in the case at bar. In the present case, such concern is not apparent. A case of the magnitude of the crime involved here had never before reached the criminal justice system in Lincoln County, Nebraska. The fact of its reoccurrence is improbable and completely hypothetical. District Judge Hugh Stuart granted a motion to sequester the jury in the Simants case the first time in his eleven years on the bench he thought it necessary to do so. In order for the South Pacific standard to be applicable here, a showing must be made by petitioners that such restrictive order is "capable of repetition by the named party, Judge Hugh Stuart." In Lincoln County, Nebraska this has not been done and, therefore, the case must be dismissed as being moot.

CONCLUSION

If it does not appear to the Court that the question here is moot, we ask the Court to consider that the District Court of Lincoln County, Nebraska had before it sufficient amount of evidence upon which it could base a finding that a "clear and present danger" existed which could impair the defendant's right to a fair and impartial trial by jury. By necessity a restrictive order such as the one entered here by the Nebraska Courts cannot be based upon absolutes but must be based upon the knowledge of the Judge from the evidence before him and his knowledge of the community in which the trial was to take place. The First Amendment rights of the press were not and could not be so damaged by an order such as the one entered here for once the jury was sworn the orders entered terminated and the press allowed to report and publish "with impunity". We most vigorously urge that the issue of restrictive orders such as were raised by the Courts here concerning pre-trial publicity be approved by this Court and they hold that where a situation arises that where Sixth Amendment rights may be impaired a balance must be stricken between the First and Sixth Amendments in order to protect the integrity of both Amendments.

Respectfully submitted,

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